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8 ERIC MENDEZ and the proposed class

9 **UNITED STATES DISTRICT COURT**  
10 **SOUTHERN DISTRICT OF CALIFORNIA**

11  
12 ERIC MENDEZ, individually and on  
13 behalf of a class of similarly situated  
individuals,

14 Plaintiff,

15 v.

16 PRICE SELF STORAGE  
17 MANAGEMENT, INC.,

18 Defendant.

Case No. 3:15-cv-02077-AJB-JLB

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
PLAINTIFF'S MOTION FOR  
PRELIMINARY APPROVAL OF  
CLASS ACTION SETTLEMENT  
AGREEMENT**

Location: Courtroom 3B  
Date: May 12, 2016  
Time: 2:00 pm

The Honorable Anthony J. Battaglia

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1 **I. Introduction**

2 Defendant Price Self Storage Management, Inc., (“Defendant” or “PSS”), a  
 3 company which rents covered and locked storage spaces to individuals at various  
 4 locations throughout California, developed a practice of sending monthly rent  
 5 notifications to its customers using its “CallPotential software.” (Compl. at 3.) Each  
 6 text message alerted customers of their ability to opt-out of receiving the text  
 7 message reminders by sending “STOP” in a reply text message. (*Id.*) Plaintiff Eric  
 8 Mendez (“Plaintiff” or “Mendez”) received such reminders and replied “STOP” to  
 9 discontinue receiving any further text messages. (*Id.* at 5.) Unfortunately for the  
 10 Plaintiff, and 315 of PSS’s other customers (“Settlement Class Members” or “Class  
 11 Members”), due to a flaw in PSS’s text messaging system PSS did not stop sending  
 12 monthly text messages to its customers after they replied “STOP” one or more  
 13 times. This violated the Telephone Consumer Protection Act of 1991, 47 U.S.C.  
 14 §227 et seq. (“TCPA”). (*Id.* at 3.)

15 Mendez tried other channels to get the messages to stop to no avail, and he  
 16 ultimately filed the instant class action lawsuit (the “Action”) on behalf of himself  
 17 and all others similarly situated on September 17, 2015. (*See* Dkt. 1.) After litigation  
 18 and informal discovery commenced, counsel for Plaintiff and PSS participated in a  
 19 full-day mediation session overseen by the Honorable Matt Railey (Ret.) in Denver,  
 20 Colorado. The mediation was successful and the Parties reached an impressive  
 21 agreement. (*See* “Settlement Agreement” or “Agreement,” attached hereto as  
 22 Exhibit A) that fairly and adequately redresses the injuries caused to Plaintiffs.  
 23 (Agrmt. at 2.)

24 The Agreement creates a fund totaling \$450,000 (the “Settlement Fund”) and  
 25 gives the proposed Settlement Class Members an option to choose between two  
 26 lucrative options: \$750 cash or \$1,100 in credit towards remaining PSS account  
 27 balances and future services. (*Id.* at 11-14.) The Agreement also releases PSS from  
 28 future claims by Class Members. (*Id.* at 15.) Finally, the Agreement provides Class

1 Members with Notice of their rights to be excluded from, comment upon, and object  
 2 to the Settlement Agreement and procedures for redeeming their award through the  
 3 use of a Claim Form (attached as Exhibit A to the Agreement. (*See* Agrmt. at 16-  
 4 19.)

5 The tremendous results achieved by the Settlement Agreement—which  
 6 exceeds on a per-claim basis settlements that have received final approval by courts  
 7 in this and other districts—are well beyond those required for preliminary approval.  
 8 Plaintiff thus moves the Court to preliminarily approve the Agreement, certify the  
 9 proposed Class, appoint Plaintiff Eric Mendez as Class Representative (“Class  
 10 Representative”), appoint Steven Woodrow, Patrick Peluso, and Stefan Coleman as  
 11 Class Counsel (“Class Counsel”), and order that notice be disseminated in  
 12 accordance with the Agreement.

## 13 **II. The TCPA**

14 A brief summary of the law that forms the basis of Plaintiff’s claims helps put  
 15 the Settlement Agreement in context. Congress enacted the TCPA in 1991 as a  
 16 response to “[v]oluminous consumer complaints about abuses of telephone  
 17 technology....” *Mims v. Arrow Financial Svcs’s, LLC*, 132 S. Ct. 740, 744 (2012).  
 18 In enacting the TCPA, Congress sought to “protect the privacy interests of telephone  
 19 subscribers.” *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 954 (9th Cir.  
 20 2009); *see also Mims*, 132 S. Ct. at 745. The TCPA applies with equal force to the  
 21 making of text message calls as it does to the making of voice calls to cellular  
 22 phones. *Satterfield*, 569 F.3d at 954.

23 The TCPA prohibits calls made with equipment termed an “automatic  
 24 telephone dialing system” (“ATDS”), which Congress defined as “equipment which  
 25 has the capacity - (A) to store or produce telephone numbers to be called, using a  
 26 random or sequential number generator; and (B) to dial such numbers.” 47 U.S.C. §  
 27 227(a)(1). The FCC has explained that equipment that dials or sends text messages  
 28 to a list of numbers is an ATDS, because “the basic function of such dialing

equipment’ is the same—‘the capacity to dial numbers without human intervention.’” *Gragg v. Orange Cab Co., Inc.*, C-12-0576, 2013 WL 1788479, at \*2 (W.D. Wash. Apr. 26, 2013) (citing Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 73 Fed. Reg. 6041-01, 6042 (Feb. 1, 2008)).

To prevail on a claim under the TCPA, a plaintiff must show that a person: (1) made text message calls; (2) using an ATDS; (3) to a telephone number assigned to a cellular telephone service. *See* 47 U.S.C. § 227(b)(1)(A)(iii). Whether Plaintiff and other Class members provided their prior express consent to receive such text messages is an affirmative defense. *See, e.g., Grant v. Capital Mgmt. Srvs., L.P.*, 499 F. App’x 598, 600 n.1. (9th Cir. 2011) (“‘express consent’ is not an element of a TCPA plaintiff’s prima facie case, but rather is an affirmative defense for which the defendant bears the burden of proof.”); *see also Evankavitch v. Green Tree Servicing, LLC*, 793 F.3d 355, 366 (3d Cir. 2015) (recognizing the defendant’s burden of showing prior express consent as an affirmative defense).

The TCPA sets statutory damages in the amount of \$500 per violation, and provides for injunctive relief prohibiting the further transmission of such messages. *See* 47 U.S.C. § 227(b)(3)(A-B). Having put Plaintiff’s claims in legal perspective, a review of the process that led up to the Settlement is demonstrative of the procedural and substantive fairness of the Settlement Agreement.

### **III. Summary of the Plaintiff’s Claim, Litigation, and Settlement Process.**

Plaintiff Mendez received text messages from PSS after he had requested for the messages to STOP. He brought the case alleging, on behalf of himself and a class of similarly situated cellphone users, that the text messages violated the TCPA. Following initial discussions between counsels and an exchange of necessary information, the Parties engaged in a mediation process with a respected mediator.

1 The result of these efforts by Plaintiff's counsel, Defendant's counsel, and the  
2 mediator is an undeniably favorable deal that reflects optimal relief for the Class.

### 3 **A. The Plaintiff's Claim**

4 In or around January 2013, Plaintiff Mendez entered into an agreement for a  
5 storage unit with PSS, and he provided his cellular telephone number to the  
6 company in connection with his application. (Compl. at 5.) Shortly thereafter,  
7 Defendant began sending messages to Plaintiff's cellular phone number. (*Id.*) A  
8 typical text message would read:

9 Eric, Please contact Price Self Storage about your storage acct. To  
10 discuss call 19092530098 or Pat at <http://cptl.me/3gf909> TXT STOP  
to Unsubscribe.

11 (*Id.*)

12 Plaintiff received the same or similar text messages for approximately six  
13 months, when he decided that he no longer wished to receive them. (*Id.*) Following  
14 the instructions contained in the message, Plaintiff typed and sent "STOP" to  
15 unsubscribe from the texts. (*Id.*) Instead of honoring Plaintiff's request, however,  
16 PSS, through its text messaging vendor, continued to send Plaintiff text messages.  
17 Some of these messages stated that PSS could not receive messages and to call the  
18 number listed to stop receiving messages. (*Id.*) Mendez then called the number  
19 contained in the messages and an operator informed him that in order to stop the text  
20 messages he would need to physically appear at a PSS location. (*Id.* at 5-6.) After  
21 informing the operator that he would be unable to physically travel to PSS's  
22 location, the operator told Plaintiff that he could stop the text messages by replying  
23 "STOP." (*Id.* at 6.) Like before, Plaintiff's "STOP" response did not prevent the text  
24 messages from being sent to his cellphone. In or around June or July of 2014,  
25 Plaintiff visited a PSS location to request his opt-out in-person. (*Id.*) There, a PSS  
26 employee informed Plaintiff that he would be removed from the text message list.  
27 Despite this assurance, just a few weeks later Plaintiff again started receiving text  
28 messages from PSS's system. (*Id.*)

1 Plaintiff replied “STOP” to no avail for over a year. Mendez again went back  
 2 to PSS to make another in-person request that his cellphone number be removed  
 3 from PSS’s list. (*Id.*)

#### 4 **B. The Litigation History**

5 Given his inability to get PSS to stop sending him text messages, Plaintiff  
 6 ultimately contacted his current counsel to inquire about his legal rights. Prior to the  
 7 initiation of the Action, proposed Class Counsel undertook an extensive  
 8 investigation into PSS and its text messaging platform to determine the scope of any  
 9 potential TCPA claims. (*See* Declaration of Attorney Steven Woodrow (“Woodrow  
 10 Decl.”) ¶ 2, attached as Ex. B). First, Class Counsel worked closely with Plaintiff  
 11 Mendez to determine the extent of the intrusive text messages sent by PSS to his  
 12 cellphone. (Woodrow Decl. ¶¶ 2-3.) Class Counsel thereafter reviewed and analyzed  
 13 complaint message boards and other sources to assess whether other PSS customers  
 14 had similarly received post-STOP texts. (*Id.* at ¶ 3.) After a thorough investigation,  
 15 Class Counsel determined that a good faith basis existed to pursue the case as an  
 16 alleged class action on behalf of Plaintiff Mendez and all other cellphone users who  
 17 received similar text messages from PSS following their submission of a STOP text.  
 18 (*Id.* at ¶ 4.)

19 On September 17, 2015, Plaintiff Mendez filed a class action complaint in the  
 20 United States District Court for the Southern District of California against PSS  
 21 alleging that Defendant violated the Telephone Consumer Protection Act, 47 U.S.C.  
 22 § 227. (*See* Dkt. 1.) Specifically, the Complaint alleged that PSS violated the TCPA  
 23 by sending text messages through an automatic dialer without Plaintiff’s prior  
 24 express written consent—and after any such consent had been revoked through a  
 25 STOP request—and sought statutory damages and injunctive relief on behalf of a  
 26 nationwide class. (*Id.*)

27 Following the filing of the initial Complaint the counsel for the parties  
 28 engaged in discussions regarding their respective views of the case and PSS’s

1 potential defenses. The Parties thereafter agreed to exchange informal discovery  
 2 under a protective order protecting confidentiality—including information regarding  
 3 the size and scope of the alleged class and PSS’s financial condition—from which  
 4 Plaintiff could appropriately evaluate the likelihood of success and value of the  
 5 claims.

### 6 **C. The Mediation and Settlement History**

7 Following the exchange of initial discovery related to the scope of the class,  
 8 counsel for the Parties agreed that the case should go to mediation and worked to  
 9 schedule a settlement conference. (Woodrow Decl. ¶ 5.) On January 5, 2016,  
 10 counsel for the Parties engaged in a full-day mediation session in Denver, Colorado  
 11 conducted by the Honorable Matthew Railey (Ret.) of the Judicial Arbitration  
 12 Group, Inc. (“JAG”). (Agrmt. at 2.) Through the mediation process, the Parties  
 13 exchanged additional, updated information regarding the size and scope of the  
 14 proposed class and PSS’s financial position. (*Id.* at 2-3.) After extensive discussions  
 15 facilitated by Judge Railey, counsel for the Parties reached an agreement in principle  
 16 regarding the relief to be made available to the Class. (*Id.* at 3.) Once the agreement  
 17 in principal was reached, the Parties negotiated an incentive award for Mendez and  
 18 an amount for reasonable attorneys’ fees for proposed Class Counsel. (*Id.*)

19 The result is a particularly strong settlement that Plaintiff Mendez and  
 20 proposed Class Counsel are proud to bring to the Court for preliminary approval. As  
 21 set forth below, the Parties’ extensive efforts and arm’s length negotiations have  
 22 produced settlement terms that clearly fall within the range of what the Court would  
 23 ultimately adjudicate as fair, reasonable, and adequate on final approval.

## 24 **IV. Key Terms of the Settlement**

25 The precise terms of the settlement are attached hereto in the Settlement  
 26 Agreement (Ex. A). A brief summary of the essential terms are as follows:

### 27 **A. Class Definition**

28 The “Settlement Class” or “Class” is defined as all Persons in the United

1 States of America or its territories who at any point from the beginning of time  
 2 through the date of this Agreement: (a) received at least one text message on his or  
 3 her cellular phone; (b) responded to the text message with the response STOP; and  
 4 (c) received at least one additional text message from PSS apart from any message  
 5 confirming the Peron's STOP request. (Agrmt. at 6-7.) PSS reasonably believes that  
 6 the total estimated size of the Settlement Class is compromised of 315 Persons to  
 7 whom text messages were sent after each Person requested STOP. (*Id.* at 7.)

### 8 **B. Monetary Relief**

9 The Settlement provides Class Members who file claims a choice of the type  
 10 of relief they want. Specifically, Defendant has agreed to provide to each Class  
 11 Member who files a claim either a cash payment in the amount of \$750 or a  
 12 certificate for \$1,100 worth of storage services. (*Id.* at 13-14.) PSS's obligation is  
 13 capped at \$450,000 total ("Settlement Fund"). (*Id.* at 11.) That is, if the total amount  
 14 required to pay each approved claim would exceed the amount in the Settlement  
 15 Fund after payment of settlement administration expenses, the court-approved  
 16 incentive award to Eric Mendez for his service as the Class Representative, and any  
 17 reasonable attorneys' fees awarded to proposed Class Counsel, then each Settlement  
 18 Class Member with an approved claim will receive a *pro rata* share of the amount of  
 19 the settlement fund remaining after payment of such amounts. (*Id.* at 14.)

### 20 **C. Prospective Relief**

21 PSS further agrees that it shall affirmatively use commercially reasonable  
 22 efforts to, on or before the Effective Date (*id.* at 7), and continuing for a period of  
 23 six (6) months from the Effective Date, honor all "STOP" requests received by  
 24 persons to whom it sends text messages. (*Id.* at 15.) In reality, PSS ceased sending  
 25 such text messages in response to this litigation and has taken steps together with its  
 26 vendor to ensure such messages are not transmitted in the future.

### 27 **D. Release of Liability**

28 In exchange for the relief described above, PSS and its related and affiliated

1 entities will receive a full release of any claims relating to text messages sent to  
 2 Class Members after replying with a “STOP” text message. (Agrmt. at 15-16.)

3 As explained below, such terms are decidedly favorable to the Class and the  
 4 Court should grant preliminary approval to the instant Agreement.

5 **V. The Proposed Settlement Class Should Be Certified.**

6 The Court’s first step in the process of granting preliminary approval of a  
 7 settlement is to determine whether the proposed settlement class is appropriate for  
 8 certification. MANUAL FOR COMPLEX LITIGATION §21.632 (4th ed. 2004); *Amchem*  
 9 *Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997). To certify a class for settlement  
 10 purposes, the plaintiff must first demonstrate that the proposed class and proposed  
 11 class representatives meet four requirements: (1) numerosity; (2) commonality; (3)  
 12 typicality; and (4) adequacy of representation. Fed. R. Civ. P. 23(a)(1)-(4).

13 In addition, a plaintiff seeking class certification must also meet at least one  
 14 of the requirements of Rule 23(b). Fed. R. Civ. P. 23(b); *Wal-Mart Stores, Inc. v.*  
 15 *Dukes*, 131 S. Ct. 2541, 2548 (2011). Rule 23(b)(2) provides that “the party  
 16 opposing the class must have acted or failed to act on grounds generally applicable  
 17 to the proposed class, so that final injunctive relief or corresponding declaratory  
 18 relief is appropriate respecting the class as a whole.” *In re Ferrero Litigation*, 278  
 19 F.R.D. 552, 561 (S.D. Cal. 2011) (quoting Fed. R. Civ. P. 23(b)(2)) (internal  
 20 quotation marks omitted). Rule 23(b)(3), in turn, requires that the plaintiff  
 21 demonstrate that “questions of law or fact common to class members predominate  
 22 over any questions affecting only individual members, and that a class action is  
 23 superior to other available methods for fairly and efficiently adjudicating the  
 24 controversy.” Fed. R. Civ. P. 23(b)(3); *Hartless v. Clorox Co.*, 273 F.R.D. 630, 638  
 25 (S.D. Cal. 2011). Here, as set forth below, Plaintiff meets each of the elements for  
 26 class certification under Rule 23(a) and satisfies the requirements of both Rule  
 27 23(b)(2) and Rule 23(b)(3).  
 28

**A. The Requirement of Numerosity is Satisfied.**

The first prerequisite to class certification under Rule 23 is that the “class is so numerous that joinder of all members is impracticable.” Fed. R. Civ. P. 23(a)(1). There is no minimum number of potential class members necessary in order to satisfy the numerosity requirement, though courts have generally found classes of 40 members or more satisfactory. *Rannis v. Recchia*, 380 F. App’x. 646, 650-61 (9th Cir. 2010) (finding a class of 20 satisfied the numerosity requirement); *Dilts v. Penske Logistics, LLC*, 267 F.R.D. 625, 632 (S.D. Cal. 2010) (finding a class of 347 individuals satisfied the numerosity requirement); *Ikonen v. Hartz Mountain Corp.*, 122 F.R.D. 258, 262 (S.D. Cal. 1988) (stating “classes of 40 or more are numerous enough”). Further, “impracticality does not mean impossibility” and the analysis should focus on the “difficulty or inconvenience of joining all members of class.” *Beck-Ellman v. Kaz USA, Inc.*, 283 F.R.D. 558, 564 (S.D. Cal. 2012).

Here, the proposed Class is comprised of 315 members that are all, or were, PSS’s customers that continued to receive text messages from PSS after replying “STOP.” (Agrmt. at 7.) Thus, the Class here is ascertainable and numerous, as 315 persons well exceeds the 40-member benchmark to establish numerosity. *Ikonen*, 122 F.R.D. at 262.

**B. The Requirement of Commonality is Met as Well.**

Second, Rule 23 requires that “there are questions of law or fact common to the class.” Fed. R. Civ. P. 23(a)(2). Commonality is demonstrated when the claims of all class members “depend upon a common contention,” with “even a single common question” sufficing. *Dukes*, 131 S. Ct. at 2545, 2557 (citation omitted); *see also Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998) (“The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class.”). The common contention must be of such a nature that it is capable of class-wide resolution, and that the “determination of its truth or falsity will resolve an issue that

1 is central to the validity of each one of the claims in one stroke.” *Dukes*, 131 S. Ct.  
2 at 2545.

3 Moreover, the permissive standard of commonality provides that “[w]here the  
4 circumstances of each particular class member vary but retain a common core of  
5 factual or legal issues with the rest of the class, commonality exists.” *Parra v.*  
6 *Bashas’, Inc.*, 536 F.3d 975, 978-79 (9th Cir. 2008). Courts have found that the  
7 issue of prior express consent by class members maintaining claims for violations of  
8 the TCPA to satisfy the commonality requirement. *Abdeljalil v. General Elec.*  
9 *Capital Corp.*, 306 F.R.D. 303, 308-09 (S.D. Cal. 2015).

10 Here, the claims of every Class Member are nearly identical. That is, the  
11 Class Members share common statutory TCPA claims premised on the allegation  
12 that PSS continued to send text messages to their cell phones after they replied  
13 “STOP.” (Agrmt. at 6-7.) The transmission of these text messages leads to a  
14 common factual and legal question for the class: whether the act of replying  
15 “STOP” revoked their consent to receiving text messages from PSS such that any  
16 post-STOP text messages violated the TCPA. Indeed, the claims of every class  
17 member hinges on whether such post-STOP messages violate the TCPA. (Agrmt. at  
18 6-7.) The answer is the same for everyone. Likewise, because PSS sent the texts to  
19 all customers using the same equipment, whether that system qualifies as an ATDS  
20 under the TCPA presents a common factual and legal question.

21 As such, the claims are susceptible to a “class wide resolution” based on  
22 common evidence in satisfaction of Rule 23(a)(2). Thus, Plaintiff Mendez meets the  
23 requirement of commonality.

### 24 **C. The Requirement of Typicality is Satisfied**

25 Rule 23 next requires that the class representative’s claims be typical of those  
26 of the putative class she seeks to represent. Fed. R. Civ. P. 23(a)(3). The typicality  
27 requirement ensures that “the interests of the named representative align with the  
28 interests of the class.” *Wolin v. Jaguar Land Rover N. Am. LLC*, 617 F.3d 1168,

1 1175 (9th Cir. 2010). Typicality is measured under a permissive standard and does  
 2 not require that the representative's claims be substantially identical, but only that  
 3 they are "reasonably coextensive with [the claims] of absent class members."  
 4 *Hanlon*, 150 F.3d at 1020. Typicality is present when a defendant acts uniformly  
 5 toward the class members, where that uniform conduct results in injury to the class  
 6 members, and where the named plaintiff suffers a similar injury to that of the class  
 7 members as a result. *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir.  
 8 1992).

9 Here, there can be no doubt that Mendez's claims are typical of those of the  
 10 rest of the Class Members. As with everyone else, PSS continued to send text  
 11 messages to Mendez after he replied "STOP." (Agrmt. at 6-7.) The statutory injury  
 12 suffered by Plaintiff mirrors the injuries of the Class Members—everyone  
 13 experienced the same type of annoyance necessarily attendant to the receipt of  
 14 unwanted messages. (See Compl. at 4-5.) Indeed, if Mendez prevails on his claim  
 15 that PSS's post-STOP text messages were sent to him without his consent, then  
 16 everyone else in the Class will similarly have a right to recovery on the same legal  
 17 theory. Hence, because the claims of the Plaintiff and proposed Class Members  
 18 "arise from the same conduct of the Defendant[s] – alleged violations of the TCPA –  
 19 and are based on the same legal theories" the typicality requirement is satisfied. *Bee,*  
 20 *Denning, Inc. v. Capital All. Grp.*, 310 F.R.D 614, 626-27 (S.D. Cal. 2015); *see also*  
 21 *Kavu, Inc. v. Omnipak Corp.*, 246 F.R.D. 642, 648 (W.D. Wash. 2007) (holding that  
 22 the typicality requirement satisfied where the named plaintiff and putative class  
 23 members all received unsolicited fax advertisements from defendant).

#### 24 **D. The Requirement of Adequate Representation is Satisfied**

25 Finally, Rule 23(a) requires that the proposed class representative must, at all  
 26 times, "fairly and adequately protect the interests of the class." Fed. R. Civ. P.  
 27 23(a)(4). To determine if representation is in fact adequate, the Court must ask: "(1)  
 28 do the named plaintiffs and their counsel have any conflicts of interest with other

1 class members and (2) will the named plaintiffs and their counsel prosecute the  
 2 action vigorously on behalf of the class?” *Hanlon*, 150 F.3d at 1020. Further, where  
 3 a plaintiff’s claims are found to be typical of those of the class, appointing that  
 4 plaintiff as the class representative will also ensure that interests of the class remain  
 5 adequately protected. *See Dukes*, 131 S. Ct. at 2551 n.5 (discussing how the  
 6 fulfillment of the typicality requirement usually also supports a finding of adequacy  
 7 because an adequate representative will have typical claims).

8 Here, Plaintiff’s interests are entirely representative of and consistent with the  
 9 interests of all Class Members. Plaintiff is committed to the effective and diligent  
 10 prosecution of this case (Agrmt. at 2-3; Compl. at 4, 7.), and no actual conflicts of  
 11 interest are present that would negate such representation. (Agrmt. at 7, 13-14.)

12 Similarly, proposed Class Counsel have already undertaken significant steps  
 13 to further the interests of proposed Class Members by ascertaining the Class,  
 14 litigating the case, and by reaching this proposed Settlement Agreement through an  
 15 arm’s-length negotiation overseen by a respected mediator. (*Id.* at 3, 7.) Proposed  
 16 Class Counsel will also continue to adequately protect the interests of the Class, as  
 17 they have regularly engaged in major complex litigation and have extensive  
 18 experience in consumer class action lawsuits. Specifically, proposed Class Counsel  
 19 has substantial experience litigating TCPA class action lawsuits that are similar in  
 20 size, scope and complexity to the present case. (Woodrow Decl. ¶ 11.; *see also* Firm  
 21 Resume of Woodrow & Peluso, LLC, a copy of which is attached to the Woodrow  
 22 Decl. as Exhibit 1.) As such, the Plaintiff and proposed Class Counsel will  
 23 adequately represent the interests of the members of the Settlement Class.

24 **E. The Proposed Settlement Class Meets the Requirements of Rule**  
 25 **23(b)(2)**

26 Upon meeting the requirements of Rule 23(a), a plaintiff must also then  
 27 satisfy one of the three requirements of Rule 23(b). *Dukes*, 131 S.Ct. at 2548. Rule  
 28 23(b)(2) is satisfied where the defendant has “acted or failed to act on grounds

generally applicable to the proposed class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the whole class.” *In re Ferrero Litigation*, 278 F.R.D. at 561. Rule 23(b)(2) is satisfied where a claim is brought under the TCPA, which provides injunctive relief, and a plaintiff seeks injunctive relief in his complaint that creates a class-wide resolution. *Bellows v. NCO Financial Systems, Inc.*, 2008 WL 4155361, at \*7 (S.D. Cal. Sept. 5, 2008) (holding that “additional training and implementation of new policies” constituted class-wide injunctive relief that satisfied Rule 23(b)(2)).

In this case, Rule 23(b)(2) is satisfied because of the uniform behavior of PSS in sending post-STOP text messages to every Class Member and because the agreed-upon injunctive relief will redress the group-wide injury. (Agrmt. at 6-7, 13-14.) PSS acted by continuing to send text messages (or failed to act by neglecting to stop such messages) in the same manner towards all member of the Class—by continuing to send text messages to Class Members after they had expressly revoked their consent to receiving such messages. (*Id.* at 6-7.) Further, the agreed-upon injunctive relief—requiring PSS to use all commercially reasonable efforts to honor “Stop” reply text messages—will redress the alleged group wide injury for everyone in the Class. (*Id.* at 15.) As such, the Class is certifiable under Rule 23(b)(2).

**F. The Proposed Settlement Also Meets the Requirements of Rule 23(b)(3)**

In addition to meeting the requirements of Rule 23(b)(2), the record also supports certification under Rule 23(b)(3). Rule 23(b)(3) provides that a class action can be maintained where: (1) the questions of law and fact common to members of the class predominate over any questions affecting only individuals, and (2) the class action mechanism is superior to the other available methods for the fair and efficient adjudication of the controversy. Fed. R. Civ. P. 23(b)(3); *Pierce v. Cnty. of Orange*, 526 F.3d 1190, 1197 n.5 (9th Cir. 2008). Certification under Rule 23(b)(3)

1 is appropriate and encouraged “whenever the actual interests of the parties can be  
 2 served best by settling their differences in a single action.” *Hanlon*, 150 F.3d at  
 3 1022. Here, the common question of whether it violated the TCPA to send post-  
 4 STOP text messages predominates over any perceived individual issues, and this  
 5 Settlement presents a superior and manageable way for resolving the controversy.

### 6 **1. Common Questions of Law and Fact Predominate**

7 The predominance requirement focuses on whether the proposed class is  
 8 sufficiently cohesive to warrant adjudication by representation. *Amchem*, 521 U.S. at  
 9 623. Predominance exists “[w]hen common questions present a significant aspect of  
 10 the case and they can be resolved for all members of the class in a single  
 11 adjudication.” *Hanlon*, 150 F.3d at 1022. Common issues of law and fact have been  
 12 found to predominate where claims brought under the TCPA of a class  
 13 representative and class members are substantially “identical,” *Bellows*, 2008 WL  
 14 4155361 at \*7, or where there are no individual issues that are likely to distract from  
 15 the focus of the litigation. Here, the common factual and legal questions—whether  
 16 the Class Member revoked their consent to receive text messages by responding  
 17 “STOP”—“forms a common nucleus of facts and potential legal remedies” that  
 18 dominates the litigation. (Compl. at 8.) Because the class-wide determination of this  
 19 issue will be the same for everyone and will determine whether any class member  
 20 has a right of recovery, the predominance requirement is satisfied.

### 21 **2. This Class Action is the Superior Method of Adjudication**

22 Finally, certification of the Settlement Class as a class action is superior to  
 23 other methods available to fairly, adequately, and efficiently resolve the claims of  
 24 the class. To meet the requirement of superiority, a plaintiff must show that a class  
 25 action is the “most efficient and effective means of resolving the controversy.”  
 26 *Wolin*, 617 F.3d at 1175-76. This final factor has far less application when the court  
 27 is presented with a settlement class for review, as no trial of the case will be  
 28 necessary. *Amchem*, 521 U.S. at 623.

1 Here, the class is comprised of 315 individual cellphone owners who have  
 2 claims that range from \$500 to a few thousand dollars, depending on the number of  
 3 text messages they received. In no case are the individual amounts at issue sufficient  
 4 to allow anyone to file and prosecute an individual lawsuit—at least not with the aid  
 5 of competent counsel. Rather, the individual prosecution of their TCPA claims  
 6 would be prohibitively expensive, and, if filed, would needlessly delay resolution  
 7 and lead to inconsistent rulings. (Agrmt. at 7.) Indeed, because this Action is being  
 8 settled on a class-wide basis, such theoretical inefficiencies are resolved and the  
 9 Court need not consider further issues of manageability relating to trial. *See*  
 10 *Amchem*, 521 U.S. at 620 (“[C]onfronted with a request for settlement-only class  
 11 certification, a district court need not inquire whether the case, if tried, would  
 12 present intractable management problems, for the proposal is that there will be no  
 13 trial.”) (internal citation omitted).

14 Accordingly, the Court may certify the Settlement Class pursuant to Rule  
 15 23(b)(3) as well.

16 **VI. The Court Should Appoint Plaintiffs’ Counsel as Class Counsel.**

17 The next step when deciding whether to preliminarily approve a settlement is  
 18 to appoint Class Counsel. Indeed, under Rule 23, “a court that certifies a class must  
 19 appoint class counsel . . . [who] must fairly and adequately represent the interests of  
 20 the class.” Fed. R. Civ. P. 23(g)(1)(B). In making this determination, courts  
 21 generally consider the following attributes: (1) the proposed class counsel’s work in  
 22 identifying or investigating potential claims, (2) the proposed class counsel’s  
 23 experience in handling class actions or other complex litigation, and the types of  
 24 claims asserted in the case, (3) the proposed class counsel’s knowledge of the  
 25 applicable law, and (4) the proposed class counsel’s resources committed to  
 26 representing the class. Fed. R. Civ. P. 23(g)(1)(A)(i-iv).

27 As discussed above, proposed Class Counsel have extensive experience in  
 28 prosecuting similar TCPA class actions and other complex litigation. *See* Woodrow

1 & Peluso Firm Resume and Law Office of Stefan Coleman, LLC Firm Resume,  
 2 attached as Exs. 1 & 2 respectively, to the Woodrow Decl., Ex. B. This includes  
 3 TCPA claims involving a defendant's alleged failure to honor and process STOP  
 4 requests sent by recipients of the messages. Further, proposed Class Counsel have  
 5 diligently investigated and prosecuted *this* matter by dedicating substantial resources  
 6 to the investigation of the claims at issue in the Action and have successfully  
 7 negotiated this Settlement with PSS. (Woodrow Decl. ¶¶ 2, 11.) Accordingly, the  
 8 Court should appoint Steven L. Woodrow and Patrick H. Peluso of Woodrow &  
 9 Peluso, LLC, and Stefan Coleman of the Law Offices of Stefan Coleman, LLC, as  
 10 Class Counsel.

11 **VII. The Proposed Settlement is Fundamentally Fair, Reasonable, and**  
 12 **Adequate, and Thus Warrants Preliminary Approval.**

13 Following class certification, a court faced with a class action settlement must  
 14 engage in a well-established two-step approval process. Fed. R. Civ. P. 23(e); *see*  
 15 *also* 4 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* ("Newberg"),  
 16 §11.25, 3839 (4th ed. 2002). The first step is a preliminary, pre-notification hearing  
 17 to determine whether the proposed settlement is "within the range of possible  
 18 approval." *Newberg*, §11.25, at 3839 (quoting MANUAL FOR COMPLEX LITIGATION  
 19 §30.41 (3d ed. 1995)); *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1110 (9th Cir.  
 20 2008); *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal.  
 21 2007). This hearing is not a fairness hearing; rather, its purpose is to ascertain  
 22 whether there is any reason to notify the putative class members of the proposed  
 23 settlement and whether to proceed with a fairness hearing. *In re Tableware Antitrust*  
 24 *Litig.*, 484 F. Supp. 2d at 1079. Notice of a settlement should be sent where the  
 25 settlement "appears to be the product of serious, informed, non-collusive  
 26 negotiations, has no obvious deficiencies, does not improperly grant preferential  
 27 treatment to class representatives or segments of the class, and falls within the range  
 28 of possible approval." *Id.*

1       The *Manual for Complex Litigation* characterizes the preliminary approval  
 2 stage as an “initial evaluation” of the fairness of the proposed settlement made by a  
 3 court on the basis of written submissions and informal presentations from the  
 4 settling parties. § 21.632 (4th ed. 2004). “[W]hether a settlement is fundamentally  
 5 fair within the meaning of Rule 23(e) is different from the question whether the  
 6 settlement is perfect in the estimation of the reviewing court.” *Lane v. Facebook,*  
 7 *Inc.*, 696 F.3d 811, 819 (9th Cir. 2012). If a court finds a settlement proposal  
 8 “within the range of possible approval,” it then proceeds to the second step in the  
 9 review process—the final approval hearing. *Newberg*, §11.25, at 3839.

10       A strong judicial policy exists favoring the voluntary conciliation and  
 11 settlement of complex class action litigation. *In re Syncor*, 516 F.3d at 1101 (citing  
 12 *Officers for Justice v. Civil Serv. Comm’n*, 688 F.2d 615 (9th Cir. 1982)). While a  
 13 district court has discretion regarding the approval of a proposed settlement, it  
 14 should give “proper deference to the private consensual decision of the parties.”  
 15 *Hanlon*, 150 F.3d at 1027. In fact, when a settlement is negotiated at arm’s-length  
 16 by experienced counsel, courts often find that there exists a presumption that the end  
 17 product is fair and reasonable. *In re Pac. Enterprises Sec. Litig.*, 47 F.3d 373, 378  
 18 (9th Cir. 1995). Though not dispositive, the presence of a neutral mediator who  
 19 assisted the settlement negotiations is further proof that the settlement was reached  
 20 fairly and provides adequate relief. *In re Bluetooth Headset Prods. Liab. Litig.*, 654  
 21 F.3d 935, 948 (9th Cir. 2011).

22       In addition, a court is not required to ascertain “a specific monetary value  
 23 corresponding to each of the plaintiff class’s statutory claims and compare the value  
 24 of those claims to the proffered settlement award.” *Lane*, 696 F.3d at 823. It need  
 25 not determine the potential recovery for each plaintiff’s cause of action, even in  
 26 those cases involving statutory damages, given that questions of fact discernible  
 27 only at trial would render any finding “speculative and contingent.” *Id.* (finding that  
 28 a \$9.5 million class recovery “would be substantial under most circumstances”).

1 Ultimately, the Court’s role is to ensure that the settlement is fundamentally fair,  
2 reasonable, and adequate. Fed. R. Civ. P. 23(e)(2); *In re Bluetooth*, 654 F.3d at 950.

3       There is little question that the proposed Settlement Agreement falls well  
4 “within the range of possible approval”—or exceeds it. The Parties have undertaken  
5 extensive negotiations and reached an outcome that best serves the interests of both  
6 Parties. (Woodrow Decl. ¶ 13.) The Agreement was reached with the substantial  
7 assistance of the Honorable Matt Railey (Ret.), who presided over the settlement  
8 mediation, assisted the Parties in reaching the Settlement Agreement, and ensured  
9 that there was no collusion in the negotiations whatsoever (*Id.*) Indeed, the  
10 Agreement is the result of arm’s length negotiations where both Parties contributed  
11 substantially and materially to the Agreement’s preparation, and where no  
12 negotiation of the Class Representative’s incentive award or any amount for  
13 reasonable attorneys’ fees was negotiated until after the relief to the Class had been  
14 agreed upon. (*Id.* ¶ 9.)

15       The terms of the Settlement Agreement build off of the foundational terms  
16 developed with the help of Judge Railey. First, Settlement Class Members have the  
17 option of claiming either a \$750 Cash Payment or a \$1,100 Certificate redeemable  
18 for outstanding PSS account balances and future storage services. (Agrmt. at 13-14.)  
19 All Claims are payable from a Settlement Fund, which itself totals \$450,000. (*Id.* at  
20 11.) The amount is fair, considering the possible consequences to PSS under the  
21 TCPA, which would range from \$500 to \$1500 per text message. When multiplied  
22 by the approximately 1,400 text messages sent by PSS in the case, \$450,000  
23 represents a 64% recovery of what the Class Members could have received IF they  
24 achieved both adversarial class certification and judgment in their favor and against  
25 PSS, assuming a damages award of \$500 per message. (Compl. at 12.) Second, PSS  
26 has agreed to focused prospective relief, the crux of which removes Class Members  
27 from PSS’s text message list and requires PSS to honor all “STOP” reply text  
28 messages. (Agrmt. at 15.)

1 Although Plaintiff and proposed Class Counsel are confident in the strength  
 2 of their claims and that they would ultimately prevail at trial, they also recognize  
 3 that litigation is inherently risky. (*Id.* at 4.) When the merits of Plaintiff’s claims are  
 4 weighed against the legal and factual obstacles remaining, combined with the  
 5 complexity of class action practice against experienced defense counsel, it is  
 6 apparent that the proposed settlement is clearly in the best interest of the Settlement  
 7 Class Members, as it immediately provides substantial monetary recovery and  
 8 prospective relief. (*Id.* at 4, 13-14.)

9 Finally, the Court need not rule on the fairness, reasonableness, and adequacy  
 10 of the proposed Settlement Agreement in a vacuum: less favorable class action  
 11 settlements have received final approval by federal courts nationwide. *See e.g.*  
 12 *Barani v. Wells Fargo Bank, N.A.*, No. 12CV2999-GPC KSC, 2014 W.L. 1389329,  
 13 at \*4 (S.D. Cal. Apr. 9, 2014) (finding a per-claim amount range of between \$7 and  
 14 \$156 fair, reasonable, and adequate); *Bellows*, 2008 WL 4155361 at \*9 (finding a  
 15 per-claim amount of \$70 satisfactory for preliminary approval); *Burris v. Sherwin-*  
 16 *Williams, Co.*, No. 4:15-cv-00343-DW (W.D. Mo. order filed Nov. 17, 2015)  
 17 (granting preliminary approval of TCPA per-claim amount of approximately \$307).  
 18 As with these similar cases, this Settlement easily falls well “within the range of  
 19 possible approval,” is fair, reasonable, and adequate, and should thus be  
 20 preliminarily approved.

## 21 **VIII. The Proposed Plan of Class Notice is the Best Practicable Under the** 22 **Circumstances**

23 As a final consideration, to satisfy the requirements of both Rule 23 and due  
 24 process, Rule 23(c)(2)(B) provides that “[f]or any class certified under Rule  
 25 23(b)(3), the court must direct to class members the best notice practicable under the  
 26 circumstances, including individual notice to all members who can be identified  
 27 through reasonable effort.” Fed. R. Civ. P. 23(c)(2)(B); *Dukes*, 131 S. Ct. at 2558.  
 28 Rule 23(e)(1) similarly states that “[t]he court must direct notice in a reasonable

1 manner to all class members who would be bound by a proposed settlement,  
 2 voluntary dismissal, or compromise.” Fed. R. Civ. P. 23(e)(1). Notice is “adequate if  
 3 it may be understood by the average class member.” *Newberg*, § 11:53, at 167. The  
 4 substance of the notice to the settlement class must describe the nature of the action,  
 5 the definition of the class to be certified, the class claims and defenses at issue, as  
 6 well as explain that settlement class members may enter an appearance through  
 7 counsel if so desired, request to be excluded from the settlement class, and that the  
 8 effect of a class judgment shall be binding on all class members. *See* Fed. R. Civ.  
 9 23(c)(2)(B).

10 As evidenced by the proposed notices appended to the Settlement Agreement  
 11 itself, the Notice plan developed by both Parties is the best practice under the  
 12 circumstances. Within seven days of Preliminary Approval, the Settlement  
 13 Administrator will be provided a Class List, as updated by PSS, containing the  
 14 cellular telephone numbers, names of the cellphone owners, and last known mailing  
 15 addresses of all 315 Class Members. (Agrmt. at 16-17.) For those numbers for  
 16 which an address cannot be determined, the Settlement Administrator will  
 17 reasonably attempt to determine such addresses through utilization of the national  
 18 change of address registry and appropriate reverse look up methods. (*Id.* at 16, 19-  
 19 20.) The Settlement administrator will then send each Class Member, via first-class  
 20 mail, a Notice Form (attached as Exhibit B to the Settlement Agreement) and a  
 21 Claim Form (attached as Exhibit A to the Settlement Agreement). (*Id.* at 16-19.)

22 The Notice will provide information to Class Members of their inclusion in  
 23 the Class because they were sent text messages by PSS after replying “STOP,”  
 24 allegedly in violation of the TCPA. (*Id.* at 16-18.) The Notice also sets forth the key  
 25 terms and provisions of the proposed Agreement, including the settlement amount  
 26 and proposed injunctive relief. (*Id.*) The Notice will advise Settlement Class  
 27 Members of their rights, including the right to be excluded from, comment upon,  
 28 and object to the Agreement and the procedures for taking such actions. (*Id.* at 17-

18.) The Notice will also include the Claim Form and explain the procedures for submitting a claim for either the \$750 in cash or the \$1,100 certificate for future storage services. (*Id.* at 16.) The Notice will also clearly state the date, time, and place of the Final Approval Hearing and advise the Class Members of their right to attend the Hearing, and to opt-out and to object to the Agreement. (*Id.* at 17-18, 22.)

## IX. Conclusion

Proposed Class Representative Mendez and Proposed Class Counsel are particularly proud of the strength of the Settlement Agreement they present to the Court for preliminary approval. The instant Agreement provides Class Members with the option of electing to receive either \$750 in cash or a certificate for \$1,100 in storage services, and also secures an agreement from PSS that it will stop sending such messages. As a consequence, the Court should find that the Agreement confers substantial benefits on the Class, compares favorably with other TCPA class action settlements, and falls well within the range of Final Approval such that notice should be sent to the Settlement Class Members.

For the foregoing reasons, Plaintiff respectfully ask that the Court certify the class, appoint Erik Mendez as the Class Representative, appoint Steven L. Woodrow, Patrick H. Peluso, and Stefan Coleman as Class Counsel, grant preliminary approval of the proposed Settlement Agreement, approve the form and manner of notice described above, schedule a Final Fairness hearing, and grant such further relief that the Court deems reasonable and just.

Dated: March 4, 2016

Respectfully Submitted,

Erik Mendez,  
individually and on behalf of a class of  
similarly situated individuals,

/s/ Michael R. Lozeau  
One of Plaintiff's Attorneys

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**CERTIFICATE OF SERVICE**

The undersigned certifies that, on March 4, 2016, I caused this document to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of filing to counsel of record for each party.

/s/ Michael R. Lozeau